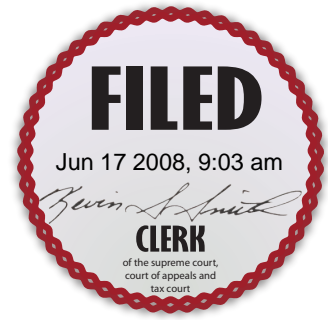


**Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



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**IN THE  
COURT OF APPEALS OF INDIANA**

JOHN R. GLENN,

Appellant-Petitioner,

VS.

STATE OF INDIANA.

Appellee-Respondent.

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No. 49A02-0710-PC-910

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Robert Altice, Judge  
The Honorable Amy Barbar, Judge Pro Tempore  
Cause No. 49G02-0104-PC-83567

**June 17, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BRADFORD, Judge**

Appellant-Petitioner John R. Glenn appeals following the denial of his petition for post-conviction relief (“PCR”). Glenn contends that both his trial and appellate counsel were ineffective. Concluding that neither Glenn’s trial nor his appellate counsel was ineffective, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

This court’s opinion in Glenn’s direct appeal is instructive as to the underlying facts and procedural history in this case:

On December 4, 2000, seventy-five-year-old Kennard A. Neal told his brother that he was going grocery shopping. Neal, who was known to carry large amounts of cash, left in his blue-green 1999 Toyota Corolla but he did not return.

On December 8, several members of Neal’s family filed a missing persons report and the Marion County Sheriff’s Department began an investigation into Neal’s disappearance.

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Neal’s vehicle was eventually located on December 19, 2000, at the Holiday Inn parking lot on East 21<sup>st</sup> Street in Indianapolis. There was blood on the control knobs, console and the passenger seat. On January 15, 2001, Neal’s frozen body was discovered on a bank of the White River near downtown Indianapolis. It was subsequently determined that Neal had suffered multiple stab wounds that caused his death. The police also discovered that Glenn, Clarence Hobbs and Gregory King used two of Neal’s credit cards to purchase numerous items on the northeast side of Indianapolis.

Homicide Detective Marc Prater was investigating Neal’s murder and, at some point, he interviewed Pamela Jones regarding some unrelated forgery charges. During the course of the interview, Jones told him that she was acquainted with Glenn and the others. Thereafter, Jones provided a taped statement that related to the case involving Neal’s homicide. At that time, Jones revealed that in mid-December, she encountered Glenn who showed her a large amount of cash and informed her that she had “missed out” on a robbery. Tr. p. 311-12. Specifically, Glenn told Jones that he and Hobbs

were at a Kroger grocery store at 10<sup>th</sup> and Shadeland when they noticed an older man with a large amount of cash standing in line in front of them. They followed him outside, and Glenn eventually admitted to Jones that he had “waxed” the older man. Tr. p. 314, 349. Following this conversation, Jones told detectives that Glenn drove her to Hobbs’s house, showed her a small blue-green four-door car parked nearby and asked Jones if she liked his new car.

On April 12, 2001, Glenn was charged with felony murder, murder and robbery. The jury was unable to reach a verdict on the felony murder and robbery charges and acquitted Glenn of murder. The State then amended the information and refiled the charges of felony murder and robbery.

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In the end, Glenn was found guilty on both counts and was subsequently sentenced to a term of sixty years.

*Glenn v. State*, 796 N.E.2d 322, 323-24 (Ind. Ct. App. 2003), *trans. denied*. On direct appeal, Glenn’s appellate counsel argued that the trial court should have granted Glenn’s motion for a mistrial following the mention of a polygraph examination administered to Jones. *Id.* at 323. This court affirmed Glenn’s conviction. *Id.* at 326.

On August 4, 2004, Glenn filed a PCR petition claiming that his felony murder conviction violated the prohibition against double jeopardy and that he had received ineffective assistance from both trial and appellate counsel. The post-conviction court denied Glenn’s PCR petition, finding that his conviction did not violate the prohibition against double jeopardy and that neither Glenn’s trial counsel nor his appellate counsel was ineffective. This appeal follows.

## **DISCUSSION AND DECISION**

Post-conviction procedures do not afford the petitioner with an opportunity for a super-appeal. *Heyward v. State*, 769 N.E.2d 215, 218 (Ind. Ct. App. 2002). Rather, post-

conviction procedures create a narrow remedy for a subsequent collateral challenge to convictions that must be based on grounds enumerated in the post-conviction rules. *Id.* In post-conviction proceedings, the petitioner has the burden of establishing his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). A petitioner who has been denied post-conviction relief appeals from a negative judgment. *Heyward*, 769 N.E.2d at 218. Therefore, the petitioner must convince the court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. *Id.*

### **I. Ineffective Assistance of Trial Counsel**

The right to effective counsel is rooted in the Sixth Amendment to the United States Constitution. *Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006). ““The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686.

A successful claim for ineffective assistance of counsel must satisfy two components. *Reed v. State*, 866 N.E.2d 767, 769 (Ind. 2007). Under the first prong, the petitioner must establish that counsel’s performance was deficient by demonstrating that counsel’s representation “fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the ‘counsel’ guaranteed by the Sixth

Amendment.” *Id.* We recognize that even the finest, most experienced criminal defense attorneys may not agree on the ideal strategy or most effective way to represent a client and therefore under this prong, we will assume that counsel performed adequately, and will defer to counsel’s strategic and tactical decisions. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. *Id.* Under the second prong, the petitioner must show that the deficient performance resulted in prejudice. *Reed*, 866 N.E.2d at 769. A petitioner may show prejudice by demonstrating that there is “a reasonable probability (*i.e.* a probability sufficient to undermine confidence in the outcome) that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.* A petitioner’s failure to satisfy either prong will cause the ineffective assistance of counsel claim to fail. *See Williams v. State*, 706 N.E.2d 149, 154 (Ind. 1999). Therefore, if we can resolve a claim of ineffective assistance of counsel based on lack of prejudice, we need not address the adequacy of counsel’s performance. *See Wentz v. State*, 766 N.E.2d 351, 360 (Ind. 2002).

#### **A. Failure to Object to the Magistrate Presiding Over Criminal Proceeding**

Glenn contends that his trial counsel was ineffective because counsel failed to object to the Magistrate presiding over his felony murder and robbery trial. Specifically, Glenn claims that “only a duly elected or appointed judge of the court or a duly appointed judge *pro tempore* or special judge may enter an appealable final judgment, including a criminal sentence.” Appellant’s Br. p. 8.

Indiana Code section 33-4-7-1 *et. seq.* (2000)<sup>1</sup> establishes the guidelines by which magistrates may preside over judicial proceedings. Indiana Code section 33-4-7-5 provides that a magistrate may serve as a judge *pro tempore* or as a special judge of the court.<sup>2</sup> Further, Indiana Code section 33-4-7-8 provides that if a magistrate presides at a criminal trial, the magistrate may enter a final order, conduct a sentencing hearing, and impose a sentence on a person convicted of a criminal offense.<sup>3</sup>

Here, the record establishes that the Magistrate was appointed by the Judge to preside over the matter as judge *pro tempore* with no objection by Glenn's trial counsel. We will defer to Glenn's trial counsel's tactical decision not to object unless Glenn can make a showing that he suffered prejudice as a result of counsel's decision. *See Smith*, 765 N.E.2d at 585. At the post-conviction proceedings, the post-conviction court specifically found that "Petitioner makes no showing of any prejudice that he suffered by the judge's order, or by his counsel's failure to object. A showing of prejudice is an essential element of *Strickland* type analysis, and the failure to make this showing is fatal to Petitioner's claim." Appellant's App. p. 120-21. Likewise, on appeal we note that Glenn has failed to present any evidence suggesting that he suffered any prejudice as a result of trial counsel's tactical decision not to object to the Magistrate presiding over

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<sup>1</sup> Since Glenn's conviction, Indiana Code section 33-4-7-1 *et seq.* has been repealed and has been recodified at Indiana Code section 33-23-5-1 *et. seq.* (2007).

<sup>2</sup> *See* Ind. Code § 33-23-5-6.

<sup>3</sup> *See* Ind. Code § 33-23-5-9.

Glenn's trial. Therefore, we conclude that Glenn's claim of ineffective assistance of trial counsel must fail in this regard. *See Williams*, 706 N.E.2d at 154.

### **B. Failure to Object on Double Jeopardy Grounds**

Glenn also contends that his trial counsel was ineffective for failing to object on double jeopardy grounds to Glenn's subsequent retrial for felony murder and robbery. Specifically, Glenn claims that murder and felony murder are the same criminal offense, and therefore, his subsequent retrial for felony murder following his acquittal of murder violates both federal and Indiana principles of double jeopardy.

Federal double jeopardy jurisprudence bars a defendant from being prosecuted for an offense after being acquitted for the same offense. *See Buggs v. State*, 844 N.E.2d 195, 199 (Ind. Ct. App. 2006) (citing *Griffin v. State*, 717 N.E.2d 73, 77 (Ind. 1999)), *trans. denied*. Accordingly, any retrial or subsequent prosecution of Glenn for murder would clearly violate his federal and state double jeopardy rights. *See id.* Here, the State did not retry Glenn on the murder charge, but the felony murder charge. Therefore, we frame the question as whether the felony murder charge, of which Glenn was convicted in the subsequent retrial, constitutes the same offense as the murder charge, of which he was acquitted in the first trial. *See id.* Under Indiana law, a conviction for the crime of murder requires a knowing or intentional killing of another human being. Ind. Code § 35-42-1-1(1) (2000). A conviction for the crime of felony murder requires the killing of another human being while committing or attempting to commit robbery. Ind. Code § 35-42-1-1(2). A comparison of the statutes demonstrates that murder requires a knowing or intentional killing while felony murder requires a killing during the commission of a

specified felony, in this case, robbery. *Buggs*, 844 N.E.2d at 200. Because felony murder and murder are not the same offense, federal double jeopardy principles do not prohibit Glenn's retrial for felony murder.

Glenn additionally contends that his retrial on felony murder and robbery charges after his acquittal on murder charges violates the Indiana Double Jeopardy Clause. In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), the Indiana Supreme Court explained that two offenses are the "same offense" in violation of the Indiana Double Jeopardy Clause "if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." The *Richardson* court further expressed that to "show that two challenged offenses constitute the 'same offense' in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." *Richardson*, 717 N.E.2d at 53.

To the extent Glenn claims that a double jeopardy violation occurred because allegedly upon retrial, Final Instruction 2 included the terms "knowingly and intentionally," we observe that Final Instruction 2 clearly established that before the jury could convict Glenn of felony murder, the State was required to prove beyond a reasonable doubt that Glenn killed Neal while committing or attempting to commit



robbery.<sup>4</sup> We also observe that there appears to be some question as to whether Final Instruction 2 was offered as a jury instruction in Glenn’s first trial or in his subsequent retrial. We note that if Final Instruction 2 pertained to Glenn’s first trial, then Glenn’s reliance on this instruction as a source of alleged error in his subsequent retrial is misplaced. *See* PCR Tr. p. 25. We further observe that to the extent Final Instruction 2 could be read to include a *mens rea* element related to the killing, such a reading benefited Glenn because it would require that the State prove a heightened *mens rea*, which it, in fact, was not required to prove. In other words, the effect of the instruction was merely to hold the State to a higher burden. Therefore, to the extent that the inclusion of the terms “knowingly and intentionally” may have constituted error, such error was harmless and did not transform felony murder and murder into the same offense.

In addition, Glenn failed to demonstrate that there was a reasonable probability that the evidentiary facts used by the jury to establish the essential elements of murder may have been used to establish the essential elements of felony murder. Glenn provided

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<sup>4</sup> Final Instruction 2, in relevant part, reads as follows:

The crime of murder, is defined by statute as follows:

A person who knowingly or intentionally kills another human being while committing or attempting to commit robbery, commits Murder, a felony.

To convict the Defendant, as charge in Count 1, the State must have proved each of the following elements beyond a reasonable doubt:

The Defendant, John R. Glenn

1. killed
2. Kennard Neal
3. while committing or attempting to commit robbery.

no argument on appeal asserting that the same evidence was used by the jury to establish the essential elements of any of the charged offenses. Further, the relevant statutory and precedential authority clearly establish that the offense of murder and felony murder are separate criminal offenses. *See Buggs*, 844 N.E.2d at 200. Based upon Glenn’s faulty assertion that, in his case, felony murder and murder are the “same offense” under either Indiana or federal law, we conclude that Glenn’s felony murder conviction did not violate the principles of double jeopardy. We further conclude, therefore, that Glenn’s trial counsel was not ineffective for failing to object to Glenn’s retrial for felony murder and robbery on double jeopardy grounds.

## **II. Ineffective Assistance of Appellate Counsel**

In addition to challenging trial counsel’s effectiveness, Glenn also contends that he was denied the effective assistance of appellate counsel on direct appeal. Claims of appellate ineffectiveness are evaluated under the *Strickland* standard of conduct falling below professional norms and resulting in prejudice such that our confidence in the outcome is undermined. *Stevens v. State*, 770 N.E.2d 739, 760 (Ind. 2002). As for challenges to an appellate counsel’s strategic decision to include or exclude issues, the petitioner must overcome the strongest presumption of adequate assistance because judicial scrutiny is highly deferential. *Ben-Yisrayl v. State*, 738 N.E.2d 253, 260-61 (Ind. 2000).

To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must show “from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue

and that this failure cannot be explained by any reasonable strategy. *Id.* at 261. Deciding which issues to raise on appeal is one of the most important strategic decisions of appellate counsel. *Stevens*, 770 N.E.2d at 760. Appellate counsel is not deficient if the decision to present some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made. *Id.* Even if counsel's choice is not reasonable, to prevail, petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different. *Id.* If the claimed issues were presented by appellate counsel and analyzed by an appellate court, relief will only be afforded when the appellate court is confident it would have ruled differently. *Id.*

Here, Glenn contends that his appellate counsel was ineffective because counsel failed to raise the double jeopardy issue as fundamental error on direct appeal. During the post-conviction proceedings, Glenn's appellate counsel testified that he had considered raising a double jeopardy claim on direct appeal, but had decided against it because he concluded that there were different elements for the murder charge of which Glenn was acquitted and the felony murder charge of which Glenn was convicted.

Upon review, we defer to counsel's strategic decision not to raise a double jeopardy claim on direct appeal and will find counsel ineffective only if Glenn demonstrates a reasonable probability that the outcome of his direct appeal would have been different had a double jeopardy claim been raised. In light of our conclusion above that Glenn's subsequent retrial for felony murder and robbery did not violate the principles of double jeopardy under either Indiana or federal law, Glenn has failed to persuade us that there is a reasonable probability that the outcome of his direct appeal

would have been different had his appellate counsel raised a double jeopardy claim. Therefore, we conclude that Glenn's appellate counsel was not ineffective in this regard.

In sum, we conclude that Glenn's subsequent retrial for felony murder and robbery did not violate the principles of double jeopardy under either Indiana or federal law. We additionally conclude that Glenn did not receive ineffective assistance of either trial or appellate counsel.

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.